

der clause 8. If she does not, she commits a breach because the liability to insure and to keep the insurance on foot is one continuous liability regardless of whether the right of renewal is automatic or otherwise. It would seem plain, therefore, that clause 16 of the hire-purchase agreement cannot possibly apply to a breach of clause 8. The appellants, therefore, have no answer to the respondent's defence of waiver in this case.

Accordingly, this appeal must be dismissed with costs.

Ong Hock Sim F.J.: I have had the advantage of reading the judgments of my brother Suffian and my brother Ali with which I concur.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Rithaudeen & Aziz.*

PR. SP. PERIAKARUPPAN CHETTIAR v. YONG BOOK FONG

[F.C. (Azmi, L.P., Suffian and Ong Hock Sim, F.J.)
December 31, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 79 of 1971]

Contract — Loan — Reimbursement of monies — Entitlement to — Contracts (Malay States) Ordinance, 1950, s. 70 — Interpretation of.

Practice and Procedure — Judgment — Variation of order of trial court — R.S.C. 1957, O. 40 r. 11.

This was an appeal against the decision of the High Court ([1972] 1 M.L.J. 13). The present appellant was the third defendant in the court below.

The respondent/paintiff borrowed some money from a firm of chettiers in Muar, on the security of two pieces of land, one piece belonging to his wife and the other to himself, in order to assist the defendants in satisfying a judgment obtained against them in a Malacca suit. The loan was for \$7,000, the monthly interest on which the defendants had agreed to pay to the Muar chettiers. The respondent did not charge the defendants any interest.

The defendants failed to pay the monthly interest, and under threat by the Muar chettiers to sell the two pieces of land, the respondent sold his land and paid off the Muar chettiers. He thereupon sued the defendants for his money.

The learned trial judge held that the respondent was a person interested in the payment of the money within the meaning of section 70 of the Contracts (Malay States) Ordinance, 1950, and therefore it was in his interest to pay off the loan in order to save his land from being foreclosed.

Held, allowing the appeal (Ong Hock Sim F.J. dissenting): the respondent was bound under the contract by law to pay the debt to the Muar chettiers. Therefore, he could not be regarded as a person interested in the payment of money within the meaning of section 70 of the Contracts (Malay States) Ordinance.

Cases referred to:-

- (1) *Umed Singh & Anor. v. Behari Lal & Anor.* A.I.R. 1922 Nag. 50 and 52.
- (2) *Sudhangshu Kumar Roy v. Banamali Roy* A.I.R. 1946 Cal. 63.
- (3) *Somashastry v. Swamirao Kashinath* (1917) I.L.R. 42 Bom. 93.

- A** (4) *Rasappa Pillai v. M.Z.D. Reddiar & Ors.* A.I.R. 1925 Mad. 1041, 1042.
- (5) *C. Chettiar v. P.V. S.P. M. Chettiar* A.I.R. 1966 Mad. 426, 427.
- (6) *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Bros.* [1937] 1 K.B. 534 at p. 543-544.
- (7) *Facchini v. Bryson* (1952) 1 T.L.R. 1386.
- B** (8) *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761.
- (9) *Robinson v. Geisel* [1894] 2 Q.B. 685 at p. 687.

The following cases were also cited in argument: *Haji Mohd. Dom v. Sakiman* [1956] M.L.J. 45; *Blay v. Pollard & Morris* [1930] 1 K.B. 628 head-note; *Chettinad Bank Ltd. of K.L. v. Sivagamipillay (f)* [1934] M.L.J. 203; *Umed Singh & Anor. v. Bihari Lal & Anor.* A.I.R. 1922 Nagpur 50; *Shettithi A.I.R.* 1934 Mad. 628; *Baishnar v. Puri Bank A.I.R.* 1963 Orissa 42, p. 44, 1st column; *Muthuswami Kavundan & Ors. v. Pnmayya Kavandan & Ors.* A.I.R. 1928 Mad. 820.

FEDERAL COURT.

W. H. Sault (H. Ball with him) for the appellant.
S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

D Azmi L.P.: I have had the opportunity of reading the judgment of Suffian F.J. and I am inclined to agree with him.

The learned trial judge had apparently accepted the view expressed by Halifax A.J.C. in *Umed Singh & Anor. v. Behari Lal & Anor.*⁽¹⁾ which read as follows. At page 50:—

E "I am unable to see any justification for the restriction placed upon the meaning of either of the two expressions used in section 69 of the Contract Act, (substantially similar to section 70 of the Contracts (Malay States) Ordinance 1950) though there appears to be some judicial authority for holding that a person legally bound to make a payment cannot be called a person merely interested in making it. But there is none at all for the proposition that the legal liability to pay, contemplated by the section in respect of the person who does not make the payment, is only such a liability as can be enforced by the person to whom the payment is to be made. Here the defendants were 'bound by law to pay' because they were legally bound to do so under their contract with the plaintiffs, and the fact that the mulguzar could not enforce this contract seems to me to have no bearing on the matter at all. To restrict the meaning of the plain words of the section in that way is to import many other words into it which the legislature could have put there but did not."

At page 52:—

H "I hold then with regard to section 69 of the Contract Act that the words 'interested in the payment of money' do not exclude the case of a person who in addition to being so interested is also legally bound to make the payment, and that the words 'bound by law to pay' include all cases of persons legally bound to pay whether under contract, or otherwise, and in the case of a contract, whether it is enforceable by the person to whom the payment is to be made or not."

The contrary view, however, is expressed in *Sudhangshu Kumar Roy v. Banamali Roy*⁽²⁾ where Anderson J. expressed it thus:—

I "That neither section 69 or 70 of the Contract Act can have any application when a man pays a debt for which he himself is personally liable."

I would, however, prefer the view expressed by Anderson J. and in the circumstances would say that the respondent being bound under the contract by law to pay the debt to the Muar chettiers could therefore not be regarded as a person interested in the payment

of money and section 70 of our Contracts (Malay States) Ordinance would therefore not apply.

I would therefore allow the appeal with costs, and in the circumstances also the costs in the court below. The appellant's deposit of \$500 would be returned to him.

Suffian F.J.: The facts of this case have been set out at length in the judgment appealed against, and it is enough if I merely refer to them in brief.

Four chettiers, partners in a firm in Kajang, had difficulty in satisfying a judgment obtained against them in a Malacca suit. They asked the plaintiff who was a *kepala* on their rubber estate for help. The *kepala* borrowed some money from a firm of chettiers in Muar on the security of a piece of land owned by him and another piece owned by his wife.

The Kajang chettiers failed to pay off the loan and under threat by the Muar chettiers to sell his land and his wife's, the plaintiff sold his land and paid off the Muar chettiers.

The plaintiff thereupon sued the Kajang chettiers for his money. If this was a simple claim for money lent, it would have been statute-barred. So he tried to bring the claim within section 70 of the Contracts (Malay States) Ordinance, 1950. If it came within that section, it is common ground that the claim was not statute-barred. In the event the learned trial judge agreed that the claim came within that section and gave judgment in favour of the plaintiff.

In the court below there were three defendants. As it happened the first defendant had died before the trial while the second defendant did not enter an appearance. Only the third defendant contested the claim, and it is he alone who is the appellant before us.

The main question in this appeal is: does the plaintiff's claim fall within the scope of section 70? That section reads—

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

To succeed, the plaintiff must in my opinion satisfy three conditions:

- (a) the third defendant was bound by law to pay money;
- (b) the third defendant did not pay and so the plaintiff paid it; and
- (c) the plaintiff was interested in the payment of that money.

There is no doubt in my mind that the third defendant failed to pay the interest due to the Muar chettiers, that the plaintiff therefore paid it and that the plaintiff was interested in that payment, as he had to prevent the forced sale of his and his wife's land. Therefore he satisfied conditions (b) and (c).

But I regret to have to hold that the plaintiff did not satisfy condition (a). In my view section 70 requires not only that the third defendant was bound by law to pay money, but that he must have been so

A bound to pay, not the plaintiff, but a *third party*, namely the Muar chettiers.

When the plaintiff obliged the third defendant and his partners by borrowing from the Muar chettiers, there must have been some arrangement between him and the Kajang chettiers; we do not know exactly what they were because they were not in evidence. All we know is that he gave his and his wife's lands as security, and to avoid a forced sale he sold his own land, paid off the loan and got back his wife's title deeds. But whatever the arrangements were, there was no evidence that under them the third defendant was in any way bound to pay the Muar chettiers.

C We have however evidence of the arrangements between the plaintiff and the Kajang chettiers, namely exhibit P16 reproduced in the judgment of the learned trial judge. I have scrutinised it with great care, because morally at least the plaintiff should get his money back, but I regret that I am unable to find anything in it to justify the conclusion that under it the third defendant was bound by law to pay money to the Muar chettiers. That document was signed only by the first defendant as managing partner of the Kajang chettiers. The Muar chettiers are mentioned in it. The Kajang chettiers undertook by that document to pay interest every month to the Muar chettiers in the plaintiff's name and to pay the principal amount to the Muar chettiers when required by the plaintiff; but the Muar chettiers were not parties to that document. With respect I agree with Mr. Sault, counsel for the appellant, that the Muar chettiers could not have sued the third defendant on that document, when he and his partners failed to pay the interest due under it. The third defendant was bound by law to pay money under the document, but he was so bound to pay the plaintiff: he was not to bound to pay the Muar chettiers.

F As was said by Beaman J. in *Somashastry v. Swamirao Kashinath*:⁽³⁾

"'Bound by law' does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay."

G In *Rasappa Pillai v. M. Z. D. Reddiar and Others*⁽⁴⁾ Phillips J. approved of the above statement. He said at page 1042:

H "I entirely agree that [the above] definition is the correct one and the same view is taken by a Bench of the Court in *Jagapati Raju v. Sadrusannama Arad* (1915) 39 Mad. 795, 801, where we find the following observation at page 801: 'The person who is interested in the payment mentioned in section 69 [corresponding to the Malayan section 70] must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay a third party.'"

Over thirty years later the Madras High Court said in *C. Chettiar v. P.V.S.P.M. Chettiar*⁽⁵⁾ at page 427:

I "The scope of the section [corresponding to our section 70] is manifest. It affords to the person who pays money because he has himself an interest in making the payment, an indemnity in respect of the payment against a person who should have made the payment, who, rather than he, could have been liable at law to make the payment."

In the instant case it was the plaintiff who was himself personally liable to pay the Muar chettiers, and it was said by Henderson J. in *Roy v. Roy*⁽⁶⁾ at page 64:

"In my judgment neither of these sections [meaning Indian sections 69 and 70 corresponding to our sections 70 and 71] can have any application when a man pays a debt for which he himself is *personally* liable."

I would therefore allow this appeal with costs.

Ong Hock Sim F.J.: Yong Book Fong, the respondent was *kepala* of rubber tappers residing in Kajang. In 1962, he was employed on a rubber estate belonging to a money-lending firm known as N.P.R. having its place of business at No. 6, Main Road, Kajang. In July, 1962 there were 4 partners of this firm, namely (1) P.N.P. Nallakaruppan Chettiar (2) P.N.P. Vairavan Chettiar (3) PR.SP. Periakaruppan Chettiar and (4) SP. Krishnappa Chettiar. Judgment was obtained in Malacca Civil Suit No. 11 of 1958 against these four partners by order made the 6th day of December 1958, as amended on the 20th June, 1962. To settle the balance due on the judgment, the first defendant P.N.P. Nallakaruppan Chettiar as managing partner of the N.P.R. Firm persuaded the respondent on July 21, 1962 to lend the firm a sum of \$7,000. This, the respondent did, by himself borrowing the amount from a Muar firm known as P.L.M. and furnishing as security for its repayment two pieces of land belonging to himself and his wife (paragraph 3 of the amended statement of claim). On the same date, the first defendant as managing partner gave an undertaking on behalf of the Kajang firm that they would be liable for the interest and repayment of the principal if and when required to do so. This undertaking in the Tamil language is Exhibit P16. There is evidence that the cheque issued by the P.L.M. Firm was handed forthwith to the first defendant and purportedly utilised towards settlement of the partners' liability under the Malacca decree. The English translation of this document reads:

Date 21.7.1962
Subakiruthu Year Aadi Month
6th date

Letter written and delivered to Chinese Yong Pok Pong residing at 16th mile Roko Road, Kajang by P.N.P. Nallakaruppan Chettiar, Managing Partner of N.P.R. Firm residing at House No. 6 Main Street, Kajang.

P.N.P. Nallakaruppan Chettiar 1, P.N.P. Vairavan Chettiar 2, PR.SP. Periakaruppan Chettiar 3, SP. Krishnappa Chettiar 4, four persons, being the partners of N.P.R. Firm are in need of money to pay and settle a decree balance of Malacca Civil Suit No. 11/58 payable to A.P.R. Periakaruppan Chettiar of Malacca. On our asking you, you and your wife have borrowed for us \$7,000 from P.L.M. Firm of Muar by executing a bond on this date charging a grant of your rubber estate and a rubber estate grant in the name of your wife, in all two grants. For this sum of Dollars Seven Thousand we ourselves shall pay interest every month to P.L.M. of Muar in your name and obtain the receipts. This letter is executed as an undertaking that, when required by you, we shall pay the principal amount to P.L.M. and shall discharge the bond and shall get back the grants belonging to both of you.

(Sd) P.N. Chettiar
Managing Partner, N.P.R. Firm.

(Sd) P.N.P. Nallakaruppan Chettiar

30.7.62 Debit paid \$1,000 (Dollars One Thousand only) towards principal.

(Sd) P.N.P. Nallakaruppan Chettiar
Managing Partner, N.P.R. Firm.

20.6.67 Credit received on this date cash \$600 Dollars Six Hundred only.

A (Sd) P.N.P. Nallakaruppan Chettiar
Managing Partner, N.P.R. Firm.

24.6.67 Credit received on this date cash \$400 Dollars Four Hundred only.

(Sd) P.N.P. Nallakaruppan Chettiar
Managing Partner, N.P.R. Firm.

Counsel for the appellant who was the third defendant on page 35 of the appeal record said:

B "According to Exhibit P16, it is clear that the loan of \$7,000 was from the Muar chettiars to the Kajang chettiars with the plaintiff and his wife giving the security for the loan."

C That statement does not seem to me to be quite correct as the loan by the Muar chettiars was to respondent and his wife. On July 30, 1962 the N.P.R. Firm repaid a sum of \$1,000 but nearly 5 years later, that is, in June 1967, borrowed two sums of \$600 and \$400. The terms of these two loans are not known and the repayment of \$1,000 should have been employed in reduction of principal and interest on the P.L.M. loan. Interest was paid by the N.P.R. to the P.L.M. on the respondent's account from the date of the loan to March 20, 1964 when N.P.R. defaulted in further payments of interest. There is no evidence that, as is alleged in paragraph 7 of the amended statement of claim, the partners were called upon to pay the interest and the principal monies to the P.L.M. Firm but there is no dispute that the respondent, in consequence of the default of N.P.R. to pay the interest, paid a sum of \$10,075 through Mr. S. Y. Chan, an advocate and solicitor (PW1), as *per* receipt Exhibit P3 dated December 7, 1967.

E On May 27, 1969 the respondent instituted suit by a specially indorsed writ for recovery of the \$7,000 and interest thereon up to April 30, 1969 and other reliefs against the three defendants. No reason was given for omitting to join the 4th partner SP. Krishnappa Chettiar. When the action came on for trial, the first defendant P.N.P. Nallakaruppan Chettiar, the author of Exhibit P16, had died and the respondent sought no relief against his estate. The second defendant was served but entered no appearance and judgment was entered against him. The third defendant, the appellant in this appeal, contested the case. F His defence was a denial of all knowledge of the claim and a plea of limitation. He chose not to give evidence.

In the event, the learned trial judge also gave judgment in favour of the respondent, hence this appeal.

H From the pleadings it is not clear what the cause of action was that respondent relied on. Counsel for the respondent finally based his claim on section 70 of the Contracts (Malay States) Ordinance, 1950. This section reads:

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

I The illustration to this section limits the claim to the amount so paid. The principle on which this section is based is stated by Lord Wright in *Brook's Wharf and Bull Wharf, Limited v. Goodman Brothers*⁽⁶⁾ to be this:

"Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant

was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount..... The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or *pro tanto*, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal."

As the appellant denied all knowledge of the transaction and did not give evidence, it falls upon the court to ascertain the true nature of the transaction. Though the transaction was inaptly described in the statement of claim as a loan from the plaintiff to the defendants, the circumstances relating thereto were fully set out in paragraphs 1 to 7 of the amended statement of claim. Exhibit P16 should therefore be construed in the light of the entire transaction of which it formed only a part. The relationship of the parties must be determined by the law and not the label which they put upon it. [See *Facchini v. Bryson*⁽⁷⁾]. According to the testimony of the respondent, he was employed by N.P.R. whose managing partner, the first defendant, approached him for financial assistance to settle the Malacca decree. The first defendant persuaded him to go to Muar to raise the loan from the P.L.M. Firm on the security of his and his wife's titles, with the assurance that this would not involve the respondent in loss of "a single cent from my pocket" and that "my grants would be available if I wanted them" and also that his firm would pay the interest to P.L.M. and also the principal of \$7,000. The loan, he further stated, was given interest free "because they were my employers." I have mentioned the pleadings are not of assistance but it is for the court to resolve on the basis of the proved or admitted facts. Unless the defendant was prejudiced thereby, and he could not be, if he chose to remain silent, it is within the competency of the court to do just that. As Lord Wright said in the case cited at page 545:

"The obligation is imposed by the court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties..... All the court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt."

Though there appeared to be one loan by the respondent to N.P.R. and a separate loan to the respondent by P.L.M., which was utilised for the purposes of the N.P.R. Firm, I think, without descending to technicalities, there was in essence only one transaction. The loan by P.L.M. was in fact a loan solicited by N.P.R. The first defendant himself took the respondent to Muar, having induced him and his wife to take their land titles along with them and it is a justifiable inference that the loan thereby incurred by the respondent to P.L.M. was at the request of N.P.R. To return to Mr. Sault's statement at page 35 of the record:

"According to Exhibit P.16, it is clear that the loan of \$7,000 was from the Muar Chettiar to the Kajang chettiers with the plaintiff and his wife giving the security for the loan."

A The repayment by the respondent to P.L.M. was therefore in payment of a debt for which N.P.R., having regard to the undertaking in Exhibit P16, was liable ultimately, if not directly, and falls therefore within the ambit of section 70. The section is accordingly applicable and consequently the issue of limitation must necessarily fail. In this connection I would like here to refer to *Halsbury's Laws of England* (3rd Edn) paragraph 396 at page 230 under the heading:

B "Liability undertaken by agreement. The defendant, instead of having the liability imposed upon him by statute, may have taken upon himself by agreement with the plaintiff the duty of discharging a liability which would otherwise fall on the plaintiff and if, by reason of breach of such agreement, the plaintiff has been compelled to pay, he may recover the amount as money paid to the defendant's use."

C This passage was quoted in *Sanjiva Row's Commentaries on Indian Contract Act* (6th Edn), Vol. II, page 1280 with the addition of this sentence:

"In such a case, the plaintiff is a person interested in the payment and defendant is a person who is bound by law to pay, and the section (section 69 = our section 70) applies."

D Other grounds of a technical nature were also raised by appellant. It was urged that the respondent had never given any notice in terms of the undertaking, as stipulated in Exhibit P16, and that therefore any cause of action under section 70 would not have accrued when the action was commenced. The short answer to this is to be found in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*⁽⁸⁾ where the delivery of the counterclaim was held tantamount to giving of the required notice. In the instant case, the issue and service of the writ fulfils the condition.

F It was further urged that the liability of a partnership being joint, the fourth partner, SP. Krishnappa Chettiar should also have been made a defendant. The appellant cannot complain as he could have applied for that partner to be joined as a defendant. In any event, failure to join that partner as a defendant would only entitle the appellant to a stay of proceedings but not dismissal of the action. [*Robinson v. Geisel*⁽⁹⁾]. I do not think that the appellant should be allowed to take advantage of this ground as he had never raised it in his own pleadings.

G As I have stated earlier, the sum of \$1,000 repaid on July 30, 1962 should have been employed in reduction of the capital, as contended by the appellant in paragraph 6 of his amended defence. The sum due to the respondent from the defendants is therefore:

Balance Principal		\$6,000.00
Interest on original principal		
of \$7,000 from 21.7.62 to 29.7.62		\$21.00
Interest on balance principal		
from 30.7.62 to 14.11.67	\$3,990.00	
Less paid to account	\$1,400.00	\$2,590.00
I Total		\$8,611.00

Section 70 only entitles the respondent to reimbursement and not compensation. The order of the court below is accordingly varied to one for \$8,611 with interest thereon at 6% from December 7, 1967 to date of satisfaction, pursuant to R.S.C. Order 40 rule 11.

There will also be an order for costs here and in the court below against the appellant.

Appeal allowed.

Solicitors: *Skrine & Co.*

PUBLIC PROSECUTOR v. HEW YEW

[R.Cr.J. (Raja Azlan Shah J.) January 4, 1972]

[Kuala Lumpur — Selangor Criminal Revision No. 13 of 1971]

Criminal Law and Procedure — Sentence — Police supervisee — Restriction to remain within doors — Failure to comply — Whether fine can be substituted for imprisonment — Prevention of Crime Ordinance, 1959, ss. 2, 15 (2)(f), and (4).

This case was heard in the High Court exercising its revisionary jurisdiction. The subject, a registered person defined by section 2 of the Prevention of Crime Ordinance, 1959, and being subject to police supervision for a term of 3 years, failed to comply with the restriction to remain within doors under section 15(2)(f) and punishable under section 15(4) of the said Ordinance. In the lower court he pleaded guilty and was fined \$100.

It was sought to revise the order of the lower court on the ground that the learned president had erred in law in imposing a fine instead of a prison sentence.

Held: the court has an absolute discretion to impose the maximum sentence of five years or any lesser sentence, the minimum of which must not be less than two years. Therefore, the sentence of fine will be set aside and substituted by a sentence of two years' imprisonment.

Cases referred to:-

- (1) *Public Prosecutor v. Lee Ah Sam* [1949] M.L.J. 236.
- (2) *Khor Seek Pok v. Public Prosecutor* [1958] M.L.J. 170.
- (3) *Public Prosecutor v. Wahab* [1964] M.L.J. 265.
- (4) *Darus v. Public Prosecutor* [1964] M.L.J. 322.

CRIMINAL REVISION.

Raja Azlan Shah J.: The subject, a registered person defined by section 2 of the Prevention of Crime Ordinance, 1959 and being subject to police supervision for a term of 3 years with effect from April 8, 1969, failed to comply with the restriction to remain within doors under section 15(2)(f) and punishable under section 15(4) of the said Ordinance. In the lower court he pleaded guilty and was fined \$100 in default one month's imprisonment.

I have been asked to revise the order of the lower court on the ground that the learned president had erred in law in imposing a fine instead of prison sentence. Section 15(4) of the Ordinance states that a registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and "shall be liable to imprisonment for a term not exceeding five years and not less than two years".

There have been a few judicial pronouncements on the words "shall be liable". In *Public Prosecutor v. Lee Ah Sam*⁽¹⁾ regulation 5(1) of the Emergency Regulations, 1949 provides that the person guilty of the offence "shall be liable to be punished with death or penal servitude for life and whipping". The Court of

A Appeal held that the sentence of penal servitude for life is a maximum sentence and any lesser sentence of penal servitude may be imposed. In *Khor Seek Pok v. Public Prosecutor*⁽²⁾ section 6 of the Dangerous Drugs Ordinance, 1952 states that a convicted person: "shall be guilty of an offence against this Ordinance and liable on conviction to a fine of \$10,000 or to imprisonment for a term not exceeding five years or to both such fine and imprisonment."

B It was held that the fine of \$10,000 provided under the section is not mandatory. It is in fact the maximum penalty provided and the court has a discretion to impose a fine of any sum within the maximum amount of \$10,000. In *Public Prosecutor v. Wahab*⁽³⁾ section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, provides that on conviction an accused:

C "shall be liable to imprisonment for a term not exceeding two years and to whipping"

is not mandatory and a fine may be imposed in lieu of imprisonment. In *Darus v. Public Prosecutor*⁽⁴⁾ it was held that the term of imprisonment of one year under section 297 of the Criminal Procedure Code is a maximum sentence and that any lesser term may be imposed as is considered appropriate to the circumstances of the particular case. It may be seen that in all these cases the words are

"shall be liable to imprisonment for a term of ... years or fine etc."

E In the context of section 15(4) of the Prevention of Crime Ordinance the words are

"shall be liable to imprisonment for a term not exceeding five years and not less than two years."

F From that it seems to me that the court has an absolute discretion to impose the maximum sentence of 5 years or any lesser sentence the minimum of which must not be less than two years.

I would therefore set aside the sentence of fine imposed by the lower court and substitute a sentence of two years' imprisonment. The said fine is to be refunded to the offender.

G *Order accordingly.*

H

I